IP 00-1029-C H/F Schopmeyer v. Plainfield Juven
Judge David F. Hamilton Signed on 9/17/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCHOPMEYER, JOEL,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
PLAINFIELD JUVENILE CORRECTIONAL FACILITY, RYAN, JOY IN HER INDIVIDUAL AND OFFICAL CAPACITY AS HUMAN RESOURCE DIRECTOR OF PLAINFIELD JUVENILE CORRECTIONAL FACILITY, BURNS, JANE IN HER INDIVIDUAL AND OFFICAL CAPACITY AS SUPERINTENDENT OF PLAINFIELD JUVENILE CORRECTIONAL FACILITY,	)	CAUSE NO. IP00-1029-C-D/F
	)	
Defendants.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOEL SCHOPMEYER, Plaintiff, v. PLAINFIELD JUVENILE CORRECTIONAL FACILITY, JOY RYAN, in her individual and official capacities, and JANE BURNS, in her individual and official capacities, Defendants.	)	CAUSE NO. IP 00-1029-C H/F

ENTRY ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Joel Schopmeyer is employed by the Indiana Department of Correction as a teacher at the Plainfield Juvenile Correctional Facility (PJCF). Schopmeyer brought this suit under the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*, which applies to federal employers and to recipients of federal funds the employment discrimination standards of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* Schopmeyer also asserts claims under the First and Fourteenth Amendments to the United States Constitution. Schopmeyer named as defendants the PJCF itself (which the court construes as the Indiana Department of Correction or DOC), PJCF superintendent Jane Burns in her

individual and official capacities, and PJCF human resources director Joy Ryan in her individual and official capacities.

Schopmeyer alleges that defendants failed to make reasonable accommodations for his claimed disability of major depression. Schopmeyer also alleges that defendants' discrimination against him on the basis of disability denied him equal protection of the law and that his free speech rights were violated when he was retaliated against after he complained about another teacher allegedly abusing a student.

Defendants have moved for summary judgment on all claims. As explained below, summary judgment is denied. If the facts turn out as defendants contend, defendants will be entitled to judgment on the merits. But all of plaintiff's claims turn on disputed factual issues. Also, the applicable law under the First and Fourteenth Amendments was sufficiently well-established to have put a reasonable public official on notice that, if the facts were as plaintiff contends, the defendants' actions would have violated his constitutional rights.

Standard for Summary Judgment

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate when there are no genuine issues of material fact, leaving the moving party entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The moving party must show there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A factual issue is material only if resolving the factual issue might change the suit's outcome under the governing law. *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). An issue is genuine if, on the written record presented, a reasonable jury could find in favor of the non-moving party on the issues raised. *Baucher v. Eastern Ind. Prod. Credit Ass'n*, 906 F.2d 332, 334 (7th Cir. 1990).

Although intent and credibility are critical issues in employment discrimination cases, there is no special rule of civil procedure that applies only to them. See, *e.g.*, *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396-97 (7th Cir. 1997). In employment discrimination cases, as in all cases, the court must carefully view the record in the light reasonably most favorable to the non-moving party and determine whether there is a genuine issue of material fact. See *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 689 (7th Cir. 2001) (same standard applies to any type of case).

Undisputed Facts

The evidence taken in the light most reasonably favorable to plaintiff shows the following. Plaintiff Joel Schopmeyer worked as an institutional teacher for PJCF from 1972 until 1976 and then worked at PJCF from 1978 to the present. Schopmeyer worked as a teacher in the main school until September 1995.

Schopmeyer has suffered from major depression since at least 1993. SMF 43. Schopmeyer has received continual, regular treatment for his depression since that time. Pl. Exs. 8A-8E, 8K. His symptoms included difficulty sleeping, thinking, concentrating, and reading. Pl. Ex. 8K. His depression also impaired his energy level and sometimes caused symptoms of physical illness. *Id.* In 1994, Schopmeyer's depression deepened to a point where he was unable to perform his job as a teacher in the main school at PJCF. SMF 47. He went on state-approved disability leave, and he received disability benefits from the state employee program from early 1994 to September 1995. SMF 48.

After Schopmeyer returned to work in 1995, he requested and received an assignment to teach at Cottage 13. Cottage 13 has fewer and less disruptive students than the general population at PJCF. It was established pursuant to a federal court order to provide a safer environment for younger and short-term offenders. SMF 50-51. Schopmeyer's depression symptoms remained sufficiently in remission so that he was able to continue teaching in his Cottage 13 position.

On September 4, 1997, Schopmeyer was teaching students in a classroom that was shared by another teacher, Deedra Runyon, at the opposite side of the room. Runyon became involved in an argument with one of her students, which resulted in Runyon pushing all of the student's books off of his desk. SMF 56. Runyon instructed the student to leave the room and followed him into the hallway. SMF 58. The student involved in the argument later spoke to

Schopmeyer and told him that Runyon had choked him in the hallway. SMF 62. Schopmeyer confirmed this with the correctional officer who witnessed the altercation. The officer did not mention the choking of the student in the incident report; he later told Schopmeyer that his superior officer had ordered him to leave that information out of his report. SMF 63-67.[1]

Schopmeyer was concerned that Runyon had inappropriately disciplined the student. Schopmeyer had previously been told that in a separate instance, Runyon had thrown a dictionary at a student. After no apparent action was taken against Runyon following the alleged choking incident, Schopmeyer anonymously reported the incident to Child Protective Services, which is part of another state agency. Schopmeyer later reported the incident to the student's father and to the Indiana Civil Liberties Union, at the student's request. An internal affairs investigator at PJCF accused Schopmeyer of making the report to Child Protective Services, but Schopmeyer denied reporting the incident because he felt threatened. SMF 73.

In October 1997, Assistant Superintendent Paul Pyatt and Principal David Weaver informed Schopmeyer that he was being transferred back to the main school from Cottage 13. The reason given was that Schopmeyer's art certification and skills were needed in the main school. Pl. Ex. 3 at 2. Schopmeyer protested

[1]Defendants do not concede these allegations are true, but the court must accept the plaintiff's evidence in deciding the summary judgment motion.

this transfer because he had previously not been teaching art and because he believed he continued to need the accommodation that was provided by the lower-stress position at Cottage 13. Schopmeyer was replaced at Cottage 13 by the involuntary transfer of teacher Charles Benson from the main school.

After the transfer, Benson resigned because he had an ear problem that made it difficult to walk the several blocks necessary to reach Cottage 13. Benson explained in a February 1999 affidavit: "We were never given any reason for the switch that made any sense." Pl. Ex. 2 at 2. Benson also stated: "Mr. Schopmeyer and I each had a minor in art and a certification to teach art, so art credentials should not have been a factor in the switch." *Id*. Also, after Schopmeyer was transferred to the main school from Cottage 13, no art program was started. SMF 85. That fact calls into question the veracity of the proffered explanation.

Schopmeyer's depression symptoms increased after the transfer because the classes in the main facility were more disruptive. SMF 81. Schopmeyer claims that he was vomiting and unable to sleep due to the stress of his position in the main school. Schopmeyer "could not concentrate well enough to function outside of work with normal activities such as reading" and also "could not teach." Pl. Aff. ¶ 38. Due to Schopmeyer's increased depression symptoms, he took disability leave again and did not return to work until two years later in November 1999. While on disability leave, Schopmeyer's salary was cut in half. SMF 84.

While on disability leave, Schopmeyer received a letter from Superintendent Kevin Moore instructing him to refrain from making inappropriate contacts with PJCF employees. Pl. Ex. 8F. The inappropriate contacts consisted of phone calls to PJCF employees regarding the investigation of Deedra Runyon. The new superintendent who replaced Moore also wrote a letter to Schopmeyer with similar instructions and warnings. Pl. Ex. 8G. Runyon sought a protective order against Schopmeyer and used the letters written to Schopmeyer by the superintendents as exhibits in support of her petition. A state court denied Runyon's petition for a protective order after a hearing.

Schopmeyer informed PJCF that he would be returning to work in late October or early November 1999. Schopmeyer's old Cottage 13 teaching position was eliminated shortly before he returned from disability leave. SMF 93. Schopmeyer returned on November 1, 1999 and again requested placement in a smaller, less disruptive classroom. SMF 94. He was refused this accommodation and was not given a reason for the denial. SMF 95. A union representative and Schopmeyer attempted to discuss his need for accommodation with the PJCF administration, but the administrators refused to discuss the issue with them. SMF 96.

One of PJCF's Title I teachers resigned in 2000.[2] There were two Title I teaching positions at PJCF. Those teachers were assigned fewer students than

[2]Title I positions are federally funded.

the average classroom. After one of the Title I teachers resigned, Schopmeyer requested on January 31, 2000 that he be transferred to the vacant Title I position as accommodation for his depression. Pl. Ex. 8H. Schopmeyer was told that he could not be transferred into the position because his salary was too high to be paid through Title I funds. Pl. Ex. 8J. A highly paid teacher in the past had been assigned to Title I, and the teacher's salary had been split between Title I funds and the regular payroll for teacher salaries. SMF 100.

After Schopmeyer's request for the Title I position as an accommodation was denied, the student body at PJCF had changed due to the opening of the new Pendleton Juvenile Correctional Facility. Schopmeyer continues to work in the main school and states: "Since the Pendleton facility opened, most classes, including those I teach, have ten or fewer students and all have less disruptive students in general." Pl. Aff. ¶ 52. Other facts are noted below as needed, keeping in mind the standard that applies on a motion for summary judgment.

Discussion

I. *Rehabilitation Act Claim*

The Rehabilitation Act of 1973 prohibits federal agencies and recipients of federal funds from discriminating in employment against an "otherwise qualified individual with a disability." 29 U.S.C. § 794(a). The Rehabilitation Act incorporates the standards of the employment provisions of the ADA. See

29 U.S.C. § 794(d). The Seventh Circuit has described the two statutes in this respect as "nearly identical." *Silk v. City of Chicago*, 194 F.3d 788, 798 n.6 (7th Cir. 1999).

Defendants have moved for summary judgment on two grounds, arguing first that Schopmeyer does not have a "disability" within the meaning of the Rehabilitation Act and second that he was not denied a reasonable accommodation for his depression.

A. *"Disability" Under the Rehabilitation Act*

The threshold issue is whether Schopmeyer had a disability within the meaning of the Rehabilitation Act. Schopmeyer relies on the "actual" disability definition in the ADA: "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). "Mental impairment" under the ADA includes "[a]ny mental or psychological disorder, such as . . . emotional or mental illness." 29 C.F.R. § 1630.2(h)(2). Major depression can constitute a "mental impairment" under the ADA. See *Krocka v. City of Chicago*, 203 F.3d 507, 512 (7th Cir. 2000); EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 2, 8 FEP Manual (BNA) 405:7462 (1997) (including major depression as an example of a "mental impairment" under the ADA).

Depression can qualify as a disability if it substantially limits a major life activity. *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1061 (7th Cir. 2000). Under the ADA and Rehabilitation Act, "major life activities" include: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). The Equal Employment Opportunity Commission's "Enforcement Guidance on the Americans with Disability Act and Psychiatric Disabilities" addresses the limitations that a mental impairment can impose on a major life activity. The guidance states that "mental impairments restrict major life activities such as learning, thinking, concentrating, [and] interacting with others . . . [s]leeping is also a major life activity that may be limited by mental impairments." Pl. Ex. 7, EEOC Notice 915.002 (March 25, 1997) at 4.

The existence of a disability is decided on a case-by-case manner. See *Toyota Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, ___, 122 S. Ct. 681, 691-92 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999). Merely submitting a physician's diagnosis of an impairment is not sufficient; the limitations caused by the particular impairment must also be substantial. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999).

Since 1993, Schopmeyer has been under regular professional treatment for his depression that includes medication and counseling. Viewing the evidence in the light reasonably most favorable to Schopmeyer, his condition has substantially

impaired his ability to sleep, read, concentrate, and interact with others, which are major life activities. His depression has forced him to take extended disability leave on two occasions. The first disability leave was in early 1994 and lasted until November 1995. Schopmeyer saw both a clinical psychologist and a physician during his disability leave. Pl. Ex. 8A, 8B. In June 1994, the DOC required Schopmeyer to be examined and evaluated by a psychiatrist of its choosing. That psychiatrist found that Schopmeyer was suffering from major depression and that he needed an extended leave from work. Pl. Ex. 8K at 3-4. The psychiatrist stated in his June 1994 report that Schopmeyer "does not read and he has poor concentration. He tries to keep busy but he quits easily and tires easily and finds that he blocks things out. * * * It is my impression that this patient is definitely suffering from major depression." *Id.*

Schopmeyer took a second disability leave after he was transferred from Cottage 13 to the main school in October 1997. This disability leave lasted until November 1999. On October 17, 1997, Dr. John E. Krol, who had been Schopmeyer's physician since March 1995, wrote a letter to DOC stating that Schopmeyer's transfer to the main school would aggravate his depression and urging DOC not to assign him to the main school. Pl. Ex. 8E.

The medical evidence here creates a triable issue as to whether Schopmeyer was substantially limited in his ability to sleep, to concentrate, and to work. The medical records show that Schopmeyer is up two or three times a night and is also

limited in his ability to concentrate and to think because he often "blocks things out." Pl. Ex. 8K at 3. When his depression symptoms have been at the most severe levels, he has been unable to work or function in any meaningful capacity for months at a time. The medical records and Schopmeyer's testimony create a triable issue as to whether Schopmeyer's depression has persisted and has substantially limited some major life activities since 1993.

Based on the evidence in the record, a genuine issue of material fact exists as to whether Schopmeyer has shown substantial limitations in major life activities which stem from his depression in order to prove a disability as defined under the Rehabilitation Act.

B. *Reasonable Accommodation*

Discrimination is defined in a number of ways under the ADA and thus under the Rehabilitation Act. An employer violates the ADA and Rehabilitation Act by intentionally treating an employee poorly because of a disability. 42 U.S.C. § 12112(b). An employer also violates the ADA and Rehabilitation Act by failing to make reasonable accommodations "to the known physical or mental limitations of an otherwise qualified individual with a disability . . ., unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business." 42 U.S.C. § 12112(b)(5)(A). Reasonable accommodations are intended to enable an individual with a disability to work. *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995).

Under the ADA, as incorporated into the Rehabilitation Act, one form of reasonable accommodation can be reassignment to a vacant position. See 42 U.S.C. § 12111(9)(B); 29 U.S.C. § 794(d).

Schopmeyer has come forward with evidence that he made three requests for accommodation that were denied: (1) in October 1997, after he was told that he would be transferred into the main school, he asked to be allowed to remain at his current Cottage 13 position; (2) in November 1999, after he returned from his second disability leave, he repeatedly renewed his requests to be accommodated by assignment to smaller, less disruptive classrooms; and (3) in January 2000 when a Title I teacher resigned, he asked to be assigned to her teaching position because she taught fewer students. All of these requests involved seeking a teaching position with fewer and less disruptive students as a way to accommodate his depression.

Viewing the evidence in the light reasonably most favorable to the plaintiff, there are genuine issues of fact concerning the reasonableness of all three requests for accommodation.

Defendants assert that Schopmeyer's October 1997 request to stay at Cottage 13 was denied because such a position did not exist at the time of his request. Schopmeyer has come forward with evidence, however, that calls that explanation into doubt. First, defendants claimed at the time that Schopmeyer

was needed at the main school to teach art, so he was transferred against his wishes to the main school. Yet he was never assigned to teach art there. Second, when Schopmeyer was being transferred against his wishes to the main school, Charles Benson was transferred against his wishes from the main school to Cottage 13, but quickly retired in response to the transfer. From this evidence, a jury could reasonably infer that the position to which Benson had been transferred was vacant and available to Schopmeyer, and also that defendants were not truthful in their proffered explanation for his transfer, supposedly to teach art classes that Benson could have taught.

With respect to the November 1999 request for an assignment to a smaller, less disruptive classroom, Schopmeyer has come forward with evidence that DOC simply denied his request without giving any reason and that DOC refused to discuss his request with him and a union representative. Defendants' motion and supporting papers also do not offer a reason for the refusal in November 1999.

With respect to the January 2000 request to be assigned to a Title I teaching position, defendants assert that the request was denied because David Weaver had been advised that a teacher like Schopmeyer at the top of the pay scale could not be placed in a federally funded Title I position. Schopmeyer concedes that Weaver was told as much, but he has come forward with some evidence indicating that there was more flexibility in funding than defendants acknowledge, so that further consideration could have resulted in an acceptable solution.

Accordingly, genuine issues of fact concerning both Schopmeyer's status as a qualified individual with a disability and whether DOC failed to provide reasonable accommodations for such disability require that defendants' motion for summary judgment be denied on plaintiff's Rehabilitation Act claim.

II. *First Amendment Free Speech Claim*

Seeking relief under 42 U.S.C. § 1983, Schopmeyer also claims that defendants violated his First Amendment right to free speech by transferring him away from the Cottage 13 assignment to a classroom with more students to punish him for statements he made about another teacher's alleged abuse of an inmate-student. Schopmeyer made those statements to Child Protective Services, the Indiana Civil Liberties Union, and the student's father. Defendants contend that the First Amendment did not protect Schopmeyer's speech because it was not a matter of public concern and his speech was made in the course of his employment.[3]

To state a claim for retaliation in violation of the First Amendment, a public employee first must establish that she engaged in constitutionally protected speech. An employee's speech is protected if: (1) it is a matter of public concern and (2) the employee's interest in the speech outweighs the state's interest in

[3]The court construes the complaint as asserting the constitutional claims for damages against defendants Burns and Ryan in their individual capacities, and for injunctive relief against Burns and Ryan in official capacities. See generally *Kentucky v. Graham*, 473 U.S. 159, 165-67 & n.14 (1985).

promoting the efficiency of its public services. *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). If an employee demonstrates that her speech is constitutionally protected, she must then prove that the defendant took an adverse employment action against her that was motivated by the protected speech. *Kuchenreuther v. City of Milwaukee*, 221 F.3d 967, 973 (7th Cir. 2000). The defendant then has "the opportunity to demonstrate that it would have taken the same action in the absence of the plaintiff's exercise of his rights under the First Amendment." *Id.*

In their motion for summary judgment, defendants argue first that Schopmeyer's speech did not involve a matter of public concern, and second that he was speaking only in his role as a public employee rather than as a citizen. The defendants' motion presents no issue regarding the balancing of the plaintiff's interest against the employer's speech in providing services efficiently. The defendants' motion also assumes that the defendants took action against Schopmeyer because of his speech about fellow teacher Runyon.

A. *Matter of Public Concern*

The first question is whether Schopmeyer's speech was a matter of public concern. The "content, form, and context" of an employee's statement should be evaluated on the record as a whole to determine whether the speech is a matter of public concern. *Connick*, 461 U.S. at 147. Seventh Circuit decisions have shown that content is the most important factor to consider when evaluating

employee speech. *Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996); *Cliff v. Board of School Comm'rs of the City of Indianapolis*, 42 F.3d 403, 409 (7th Cir. 1994).

The court has little difficulty finding that Schopmeyer's speech about another staff member's (alleged) abuse of a student-inmate qualifies as speech on a matter of public concern. The Seventh Circuit regards most issues concerning the performance of a police department as matters of public concern. See *Gustafson v. Jones*, 117 F.3d 1015, 1019 (7th Cir. 1997) (speech was on matter of public interest where it "related to how police investigations are to be conducted, and what kind of balance between individual officer initiative and central control was to be struck"); *Campbell*, 99 F.3d at 827-28 (senior police official's letter criticizing chief's community policing program was speech on matter of public concern); *Glass v. Dachel*, 2 F.3d 733, 741 (7th Cir. 1993) (police officer's statement that superior officer had stolen property from evidence room addressed matter of public concern); *Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) ("It would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety.").

Similar concerns are presented when the topic is how a state government treats the juvenile inmates in its correctional facilities. See generally *Myers v. Hasara*, 226 F.3d 821, 826 (7th Cir. 2000) (reversing summary judgment where health department employee was punished for criticizing enforcement policies of

her department: "It is important to good government that public employees be free to expose misdeeds and illegality in their departments. Protecting such employees from unhappy government officials lies at the heart of the *Pickering* cases, and at the core of the First Amendment."); *Khuans v. School Dist. 110*, 123 F.3d 1010, 1016 (7th Cir. 1997) (employee's statements about employer's failure to comply with legal requirements for education of children with disabilities were on matters of public concern; "bringing to light actual or potential wrongdoing during the provision of public services obviously is in the public's interest"); *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1218-19 (7th Cir. 1994) (plaintiff's complaints to plan commission about building inspector's failures were, as a matter of law, speech on matters of public concern). Also, the evidence does not compel a conclusion that Schopmeyer was exercising any personal grudge or agenda in making statements about the other teacher's alleged abuse of a student-inmate. See *Delgado v. Jones*, 282 F.3d 511, 518 (7th Cir. 2002) (affirming denial of motion for judgment on pleadings; plaintiff's controversial statements were not made for private purpose); see also *Gustafson v. Jones*, 290 F.3d 895, 913 (7th Cir. 2002) (speech can address matter of public concern even if motivated in part by plaintiff's personal stake in outcome of dispute).

B. *Statements Required in Course of Employment*

Defendants rely on *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001), to argue that statements made in the course of a public employee's regular

job duties are not matters of public concern. Defendants contend, in essence, that because Schopmeyer claims he was required by law to report child abuse, such legally mandated speech is not protected. *Gonzalez* does not reach so far. The Seventh Circuit explained its limitations in *Delgado v. Jones*, 282 F.3d at 519, stating that the rule of *Gonzalez* was "limited to routine discharge of assigned functions, where there is no suggestion of public motivation." This court agrees with that reading of *Gonzalez*. Schopmeyer's reports and statements regarding Runyon's alleged abuse of a student-inmate was not at all routine or part of his assigned duties. Also, even if the reasoning of *Gonzalez* applied to Schopmeyer's report to Child Protective Services, it would not apply to his reports to the Indiana Civil Liberties Union or to the student's father.

Accordingly, defendants are not entitled to summary judgment on the merits of the First Amendment claim. Defendants also are not entitled to summary judgment on their defense of qualified immunity. If the facts are those asserted by plaintiff – a question this court cannot resolve on a motion for summary judgment – then the law was well established in 1997 that retaliation against a public employee's constitutionally protected speech critical of co-workers or supervisors would violate the First Amendment. See, *e.g.*, *Myers v. Hasara*, 226 F.3d at 829 (reversing summary judgment on qualified immunity grounds where public employee was suspended for criticizing department's enforcement policies); accord, *Gustafson v. Jones*, 290 F.3d 895, 913 (7th Cir. 2002) (affirming

denial of qualified immunity where defendants transferred police officers from elite unit because of their public letter questioning superior's order).

III. *Fourteenth Amendment Equal Protection Claim*

Schopmeyer alleges that he was denied equal protection of the law as a member of a protected class of disabled employees at PJCF. Schopmeyer has identified himself with a class including James McLaughlin, Robert Scott, James Michael, and Charles Troutman. Scott and Michael were correctional officers, McLaughlin a driver, and Troutman a maintenance worker. SMF 20.

To maintain an equal protection claim, a plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he is otherwise similarly situated to members of the unprotected class; (3) he suffered an adverse employment action; (4) he was treated differently than members of the unprotected class were; and (5) the defendant acted with discriminatory intent. *McPhaul v. Board of Comm'rs of Madison County*, 226 F.3d 558, 564 (7th Cir. 2000), citing *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000), and *Jackson v. City of Columbus*, 194 F.3d 737, 751-52 (6th Cir. 1999). To meet the fifth prong, the plaintiff must show that the defendant acted or failed to act with "a nefarious discriminatory purpose"and discriminated against plaintiff because of his membership in a definable class, in this case because he is disabled. See *McPhaul*, 226 F.3d at 564.

The defendants argue that Schopmeyer has not established a prima facie case for three reasons: (1) that he is not a member of any protected class; (2) that he has not shown he is similarly situated to non-disabled teachers; and (3) that he did not suffer any adverse employment action.

In response to the first point, Schopmeyer has come forward with evidence that other PJCF employees with disabilities have been singled out for adverse treatment. There is no legal reason why a class of persons with disabilities is not entitled to assert rights under the Equal Protection Clause. See Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 366 (2001) (discrimination against persons with disabilities subject to rational relation scrutiny under Equal Protection Clause), citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985).

Regarding the second point, defendants are correct that no other teachers at PJCF have requested to teach classes smaller than the average class. However, plaintiff is not necessarily limited to other teachers in his search for comparisons. Schopmeyer has come forward with evidence which, when viewed in the light reasonably most favorable to his case, shows other instances of discrimination by PJCF management against employees with disabilities. The evidence obviously can be viewed in a very different way, as defendants do, but choosing between such different views of the evidence is not the function of a summary judgment decision.

Regarding the third point, the October 1997 transfer away from Cottage 13 to the main school could reasonably be viewed as having forced Schopmeyer to take a prolonged disability leave from work that caused him to suffer substantial adverse financial consequences.

Defendants also contend there is no evidence that they acted with discriminatory intent, but such an inference is permissible in this case from the circumstantial evidence of the treatment of Schopmeyer and other employees with disabilities, again when the evidence is viewed, as it must be at this stage, in the light reasonably most favorable to the plaintiff.

Defendants have also argued that they are entitled to qualified immunity on the equal protection claim. Their argument is based on their version of the facts, however, rather than the plaintiff's version, which controls the court's consideration of the defendants' motion. Defendants rely on *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442-47 (1985), to argue that government discrimination against persons with disabilities is permissible as long as the government is acting in a way that is rationally related to achieving a legitimate state purpose.

Under plaintiff's version of the facts, however, defendants have irrationally forced employees with disabilities to take leaves of absence even if they were able to perform the essential functions of their jobs. Under that version of the facts,

the unconstitutional character of the alleged actions was well established by 1997, and defendants are not entitled to qualified immunity.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment is denied as to all remaining claims. The court will hold a scheduling conference on **Friday, October 18, 2002, at 10:00 a.m.** to set a new trial date and to take up related matters to resolve this action.

So ordered.

Date: September 17, 2002

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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